SUPREME COURT, U.S.
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No. 89-422

In The

Supreme Court of the United States

October Term, 1989

SANDRA WILLIAMS,

Petitioner,

vs.

JOHN HEALEY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err when it imposed a drastic seventy-five percent reduction of attorney's fees requested by a prevailing civil rights appellee without comment or explanation?

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ORDER BELOW

The petition challenges an order of the Court of Appeals for the Second Circuit, *i.e.*, a margin order dated April 28, 1989. (Hon. William H. Timers, Thomas J. Meskill, Jon O. Newman U.S.C.J.J.). A timely petition for rehearing with a suggestion for rehearing by the members of the court convened *en banc* was denied on June 12, 1989.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. Sec. 1254(1). Respondent denies that jurisdiction lies.

STATUTORY PROVISION INVOLVED

Petitioner relies on Section 1988 of Title 42 of the United States Code, which provides that in federal civil rights actions or proceedings, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

COUNTER STATEMENT OF THE CASE

A jury verdict for violation of civil rights (false arrest) was rendered in favor of Petitioner Sandra Williams, the Plaintiff-Appellee below, awarding her $1,000 compensatory damages and $3,000 punitive damages.

Subsequently, the trial judge awarded an additional $9,855.50 in attorney fees and costs, of which $203.00 represented costs. The defense moved for Reconsideration. After a period of time the trial Court reduced the award to $9,775.50, representing a reduction of $80.00 in costs.

An appeal from the jury's verdict was subsequently taken, with a decision in favor of Ms. Williams.

Counsel for Ms. Williams sought an additional $11,400.00 in attorney fees, plus $116.61 in costs, for the

appeal. The application claimed 70.4 hours of work for Attorney Karen Lee Torre at $125.00 per hour ($8,800.00), and 13 hours of work for Attorney Sue L. Wise at $200.00 per hour ($2,600.00).

The Respondent John Healey, Defendant-Appellant below, filed a timely Opposition to both amounts. The Court of Appeals, by margin order, awarded the full $116.61 costs but awarded only $3,000.00 attorney fees.

Petitioner then filed a Petition for Rehearing and a Suggestion of En Banc Hearing which was denied without any request for a vote on the suggestion of en banc hearing.

REASONS FOR DENYING THE WRIT

1. The Writ should be denied because the petition presents no issue appropriate for review by this Court.

The petition is nothing more than dissatisfaction with the discretion exercised by the Second Circuit in arriving at the amount to be awarded and the fact that the Second Circuit did not write a full articulation of its reasons.

In 1972 this Court disposed of a similar claim in *Taylor, et al vs. McKeithen, et al*, 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972). There the Court expressly recognized "that the courts of appeals should have wide latitude in their decisions of *whether* or how to write opinions," *Id.*, at 194-5 n. 4, 92 S.Ct. at 1982 n. 4 (emphasis added), even with respect to decisions on the merits of an appeal.

Instead, the Court in *Taylor* recognized the necessity of a remand to a court of appeals for greater articulation only in a very limited situation not present in this case, *i.e.*, in the "special circumstances [of a complex case where the Court is] loath to impute to the Court of Appeals reasoning that would raise a substantial federal question [on the merits of the appeal] when it is plausible that its actual ground of decision was of more limited importance." *Id.*, at 194-5 n. 4, 92 S.Ct. at 1982 n. 4 (bracketed portions added).[1]

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[1] The Petitioner relies only on cases requiring written findings when decisions are rendered by the District Courts. The District Courts are subject to more stringent requirements of articulation by Federal Rule of Civil Procedure 52(a), reprinted at Appendix A1, which is intended to assist the Courts of

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See Rules of the Second Circuit Court of Appeals, Part I, Sec. 0.23., reprinted at Appendix A2.

In the instant case there is no relevant division of opinion among the Circuit Courts of Appeal. There is no unique or substantial issue of constitutional or federal law presented. There is no mandatory requirement that the Circuit Court provide a written, detailed opinion in every instance in which it rules on either the merits of an appeal or an application for attorney fees and costs.

In sum, no issue posed in the petition merits the devotion of this Court's limited resources.

2. The Writ should be denied because the record fully supports the discretionary action of the U.S. Court of Appeals for the Second Circuit in reducing the amount of attorney fees claimed by the petitioner.

Summary. We itemized for the Second Circuit (i) nearly 25 hours of claims by Attorney Torre which we felt should be compensated at less than her full hourly rate because the worked performed was routine and did not

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Appeal in effectively exercising their somewhat broader scope of review. *Lemelson vs. Kellogg Co.*, 440 F.2d 986 (2d Cir. 1971).

In fact, it is Respondent who had a potential claim in the Court of Appeals because of the trial judge's reliance on a mere margin order in granting his award of attorney fees and costs. In other words, the Petitioner's attorneys received a windfall in the trial court.

Petitioner apparently does not see anything wrong with the fact that the trial judge's award was by a simple, conclusory margin order.

require any particular skill, (ii) more than 30 hours of claims by Attorney Torre which we felt were wholly unjustified, and (iii) 13 hours of claims by Attorney Wise which we felt were also unjustified.

Clearly, the Second Circuit agreed with our detailed analysis.

(i) Petitioner ignored prior decisions limiting the amount of attorney fees to be awarded for routine work or work not requiring particular expertise.

We do not agree that all hours claimed for work (routine or otherwise) were justified. We discuss such total claims *infra*.

However, to the extent such hours were justified the Second Circuit Court of Appeals has held (without challenge by the petitioner in this case) that work devoted to routine matters or matters which do not require particular expertise should be compensated at lower rates than those appropriate for trial and other work requiring greater skill.[2]

Those authorities were pointed out to Petitioner's attorneys in our Motion for Reconsideration of the attorney fees awarded by the trial court, and at least one of those precedents involved the law firm representing the petitioner.

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[2] *Cohen vs. West Haven Board of Police Commissioners*, 638 F.2d 496, 505 (2d Cir. 1980); also *Guarino vs. Amato*, Civil No. N-83-99 (Meskill, Circuit Judge, sitting by designation) (D. Conn. 1987) (copy attached to our April 26, 1989, Opposition to Application for Attorney Fees and Costs, in the U. S. Court of Appeals for the Second Circuit).

Nevertheless, Petitioner's Attorney Karen Lee Torre claimed her full hourly rate of $125.00 per hour for nearly 25 hours of work (quoted hereinafter) which we believe is fairly characterized as routine or not requiring particular expertise work.

> Call to client Re: Appeal; letter to client
>
> Prep. & travel to New York . . .
>
> Call from client re: appeal; letter to client; call to clerk's office
>
> Call from appellant's counsel re: stipulation on appendix; visit from staff member of N.H. corp. counsel for signature on stipulation
>
> Three telephone calls to Clerk's office – Ct. of Appeals; . . . binding of copies of brief after final revisions to brief; delivery of brief to JRW for filing; call from appellant's counsel Re: production of deferred appendix
>
> Scheduling/file review; letter to Appellant's counsel
>
> Call from 2d Circuit office; call from client; call to client; call to appellant counsel; redictation of page proof brief in final form *c* joint app. citations
>
> Review/proof of appellee brief in final form; conference with secretary; call to printer; call to 2d Circuit; prep. of certification/signature; check of 10 copies plus original – call to Federal Express for delivery
>
> Calls to 2d Circuit
>
> Calls re: hotel reservations; call to 2d Circuit re: confirmation of appearance time & panel; prep. and travel from Stony Creek, CT to New York City; . . .

. . . travel back to hotel and travel return to Stony Creek, CT

The Second Circuit – in its discretion – obviously agreed with our analysis.

(ii) Petitioner ignored the many precedents, including four cases involving the law firm representing the petitioner, rejecting her theory that an attorney's alleged "billing rate" is the measure of reasonable attorney fees.

Petitioner's counsel claimed that they should be compensated at their alleged "billing rates". In at least four instances where the law firm representing the instant Petitioner has made such a "billing rate" argument, the Courts have rejected the argument.[3]

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[3] *O'Neill vs. Krzeminski, et al,* U.S. Court of Appeals, Docket No. 87-7272 (Order of March 11, 1988) (copy attached as Exhibit 4 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *O'Neill vs. Krzeminski, et al,* Civil No. N-83-102 (WWE) (Ruling on Plaintiff's Application for Costs and Attorneys Fees, filed April 20, 1987) (copy attached as Exhibit 3 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *Guarino vs. Amato,* Civil Action No. N-83-99 (TJM), (Memorandum of Decision on Motion for Award of Costs and Attorney's Fees Pursuant to 42 U.S.C. Sec. 1988, filed January 26, 1987) (Circuit Judge Meskill, sitting by designation) (copy attached as Exhibit 2 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals); *Williams vs. Healey,* Civ. N-87-113 (WWE) (Order of Dec. 5, 1988, on reconsideration Jan. 5, 1989) (copies attached as Exhibits 5 and 6 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals).

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Instead, the hourly rate to be awarded is to be based on the reasonable prevailing rate in the area for similar work performed by similarly skilled attorneys. *Blum vs. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

Under this standard petitioner offered no evidence in the District Court or the Court of Appeals to justify the $200.00 per hour sought by Attorney Wise and no evidence to support a full $125.00 per hour award for the above-listed routine work claimed by Attorney Torre. (We did not dispute in the Court of Appeals that $125.00 per hour was appropriate for specialized work by Attorney Torre.)[4]

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The foregoing are unpublished opinions. We cite them at this point in order to make clear that Petitioner's counsel was well aware of the precedents concerning their alleged "billing rate" theory yet pressed ahead with the same argument. It may well be that that too was a factor in the Second Circuit's disposition of the attorney fee claim.

[4] In the more than 100 cases this office has handled with the firm representing the petitioner over 11 years, evidence at trial is that they almost always charged a flat rate of only several hundred dollars for the related criminal case. In our experience most criminal cases which underlie such civil rights lawsuits result in "nolles" and thus no finding on the validity of the arrest.

In fact, in the December 1986 trial in *Belcha vs. DeBenedet, et al*, Civil No. N-85-212 (PCD), another attorney, formerly with the same law firm, testified under oath in the presence of this attorney and in the presence of Attorney Sue L. Wise that it was the frequent practice in that law firm to charge modest flat fees of but a few hundred dollars for such criminal work. Perhaps more affluent clients are charged hourly rates.

If attorney fee awards are allowed to be governed by the alleged "billable rates" of attorneys, the attorneys can routinely and unilaterally increase awards under 42 U.S.C. Sec. 1988 by merely increasing their alleged billing rates, regardless of the reasonableness of such rates or how rarely they actually charge someone that rate. That is exactly what Petitioner's attorneys attempted to do in this case.

(iii) The Second Circuit properly recognized that the amounts claimed by Petitioner's attorneys were excessive.

The total hours claimed by both attorneys for Petitioner was excessive. Petitioner claimed a total of 83.4 hours for the relatively simple appeal.

(a) Petitioner's counsel claimed nearly 15 hours for research although they added only four (4) cases to those cited by Respondent Healey's attorney in the initial brief on appeal.

(b) The law firm representing the Petitioner specializes in case alleging police misconduct and has filed hundreds in the State of Connecticut.

(c) The only issue on appeal concerned the accuracy of a few sentences of the instruction to the jury.

(d) The relevant law was not in dispute and the appeal concerned only the proper application of the law to the facts of the case.

(e) Petitioner claimed that the appeal was frivolous.

(f) Petitioner's counsel virtually ignored the last eight pages of Respondent Healey's initial brief on appeal.

(g) Nearly all of those last eight pages of Respondent Healey's initial brief on appeal were virtually identical to pleadings in a case previously litigated between the same two law offices.

(h) We identified more than thirty hours claimed by Attorney Torre and 13 hours claimed by Attorney Wise as unjustified (regardless of the amount of compensation that might have been appropriate if the time claimed had been justified).

(i) Petitioner's attorney had claimed 1.6 hours for additional research to respond to our Reply Brief on appeal, even though our Reply Brief cited no additional cases, offered no new arguments, and simply reprised portions of our initial appeal Brief in order to respond to specific arguments in the Appellee's Brief.

(j) Petitioner's counsel had claimed that substantial additional time was needed because we used a Deferred Joint Appendix. However, they had stipulated to use of the Deferred Joint Appendix, and all that required was substituting the page numbers of the Deferred Joint Appendix in the final copy of their appeal Brief.

All of the foregoing matters were brought to the attention of the Second Circuit and documented with appropriate exhibits to our April 26, 1989 Opposition to Application for Attorney Fees and Costs.

The Second Circuit – in its discretion – agreed that the Petitioner's counsel overstated their claims.

The total amount of time claimed by one of Petitioner's attorneys was also unjustifiably duplicative.

Attorney Sue L. Wise claimed she had necessarily expended 13.0 hours of work, in addition to the 70.4 hours claimed by Attorney Torre. Attorney Wise demanded $2,600.00, at $200.00 per hour, in addition to the fees demanded by Attorney Torre.

Attorney Sue L. Wise claimed the following amounts of time.

DATE	DESCRIPTION	HOURS
1-14-89	Research (West Law)	5.
1-17-89	Recast of brief	6.
1-18-89	Final proof of brief	2.
Total Time		13. Hours

Attorney Wise's claim of 5 hours West Law Research is in addition to the nearly 10 hours research claimed by Attorney Torre. The result of those fifteen (15) hours of purported research was only four (4) very basic cases in addition to the cases cited in the Respondent Healey's initial Brief on appeal.

Attorney Wise claimed that she needed to devote another 8 hours to recasting and proofing their Brief, in addition to the many hours devoted by Attorney Torre.

While prevailing parties are not barred as a matter of law from receiving fees and costs for a second attorney in the case, "the scope and complexity of the particular litigation" must justify the duplication of attorney fees and related costs as being "reasonably needed to prevail in the litigation."[5]

In this case, the appeal was relatively simple,[6] little research was required, claimant Attorney Karen Lee Torre personally handled the trial, and the Affidavit of Attorney Karen Lee Torre indicated that she is an experienced and skilled attorney.

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[5] *New York State Association for Retarded Children, et al vs. Carey, et al,* 711 F.2d 1136, 1146 (2d Cir. 1983); *O'Neill vs. Krzeminski, et al,* Civil No. N-83-102 (WWE) (Ruling on Plaintiff's Application for Costs and Attorney Fees, filed April 20, 1987) (D. Conn.) (copy attached as Exhibit 3 to our April 26, 1989 Opposition to Application for Attorney Fees and Costs in the Court of Appeals).

[6] Contrast facts in: *New York State Association for Retarded Children, et al vs. Carey, et al, supra,* 711 F.3d 1136, 1139, 1142, 1146 (2d Cir 1983) (substantial nearly one-third reduction in claimed hours despite complex class action litigation, involving "complex legal issues," resulting in a comprehensive decree which provided "Steps, Standards and Procedure" for improving conditions at a state institution for the retarded; followed by "elaborate subsequent proceedings challenging compliance with the decree"); *Ross vs. Sattmarsh,* 521 F.Supp. 753 (S.D.N.Y. 1981) (complex class action litigation resulting in a comprehensive plan for implementing procedural safeguards in city school district's disciplinary process; extensive depositions and document discovery and review, and attrition of attorney personnel during the six year course of the proceedings).

The hourly rate claimed by one of Petitioner's attorneys was excessive.

(i) When the parties sought to resolve the issue of attorney fees amicably only $150.00 per hour was claimed on behalf of Attorney Wise. (See hand-written memorandum attached as Exhibit 1 to our April 26, 1989 Opposition to Attorney Fees and Costs.)

(ii) Even Attorney Wise's Affidavit indicated that she has never received an award in excess of $150.00 per hour. Instead, her Affidavit alleged that her "billing rate" was $150 per hour until the Fall of 1988 and since then her "billing rate" has been $200.00 per hour.

(iii) Respondent's counsel is aware of only two instances where more than $150.00 per hour has been awarded for similar work in the District of Connecticut. In both instances the awards were for only a few hours work, one award was made without apparent opposition, and the other award was made when the opposition was filed after the deadline for doing so. We disclosed both of those instances to the Second Circuit in our Opposition to Application for Attorney Fees and Costs.

CONCLUSION

For the foregoing reasons the Petition should be denied. The law firm representing the Petitioner has filed hundreds of cases alleging police misconduct in the District of Connecticut, and they have continued to do so subsequent to the Second Circuit's disposition of their attorney fee application. They do not appear to have suffered any disincentive due to the Second Circuit's ruling.

Respectfully submitted,

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OCTOBER 20, 1989

Federal Rule of Civil Procedure 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or

not the party raising the questions has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963).

Rules of the Second Circuit Court of Appeals

Part I, Sec. 0.23. Disposition in Open Court or by Summary Order

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

(Added Oct. 31, 1973, and amended June 10, 1977.)